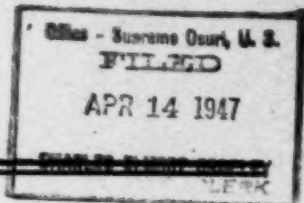


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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1946

No. 1247

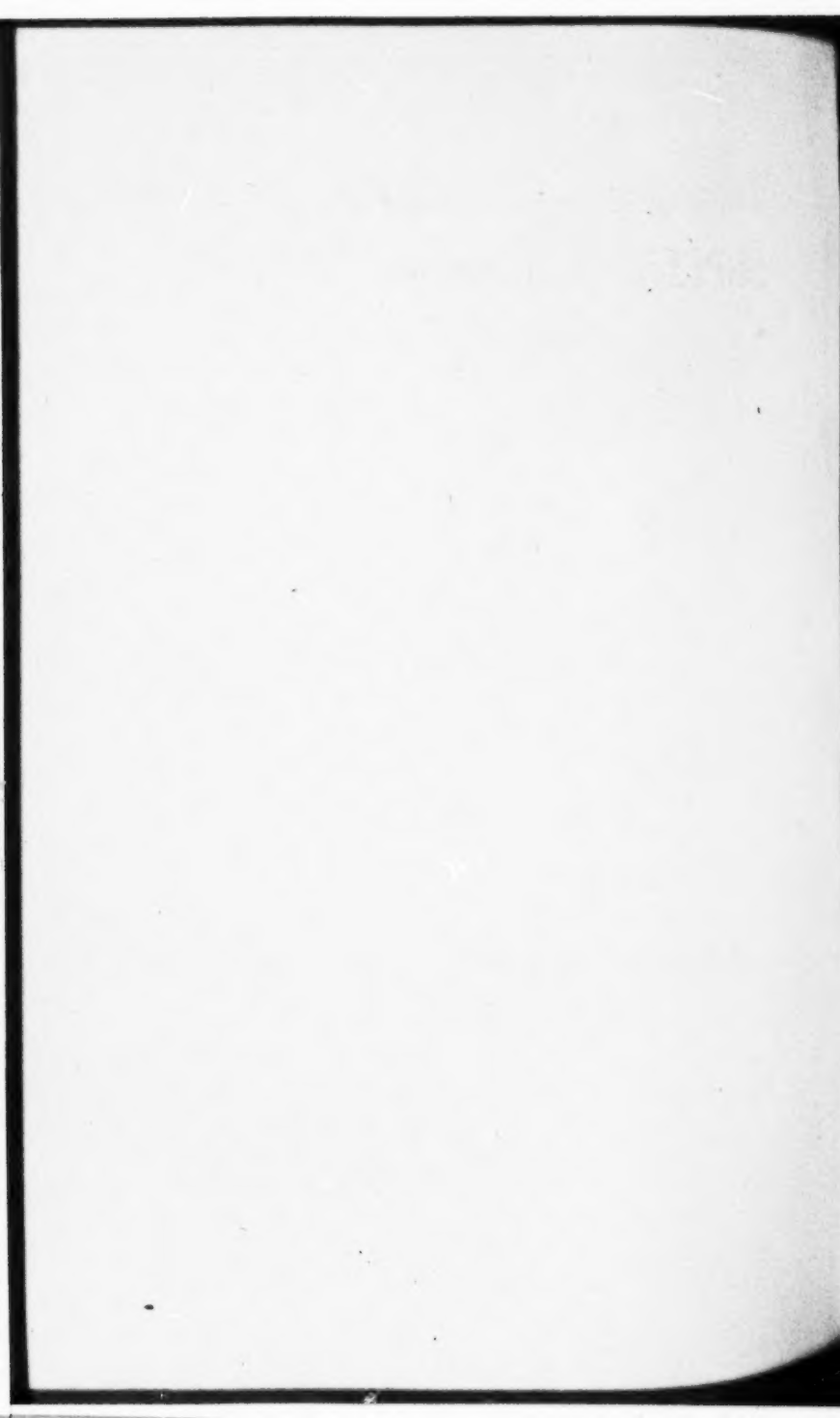
RICHARD HENRY LEA, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT.**

✓
**M. A. GRACE,
EDWIN H. GRACE,
Attorneys for Petitioner.**



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No.

RICHARD HENRY LEA, JR.,
Petitioner,

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UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT.**

TO THE HONORABLE, THE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

A

**SUMMARY STATEMENT OF THE
MATTER INVOLVED**

This is an application on behalf of petitioner asking this Court to review the allegations of fact in the indictment herein, and determine whether the facts alleged con-

stitute the crime of embezzlement under Section 47 of the Criminal Code of the United States, Title 18 United States Code Annotated, Section 100. Petitioner demurred to the indictment as failing to set forth such offense, or any offense under the laws of the United States, but which demurrer was overruled, and the District Court accepted a plea of *nolo contendere*, and sentenced petitioner for an alleged offense of embezzlement under the aforesaid statute. On appeal, the Circuit Court of Appeals, sustained the action of the District Court in overruling the demurrer.

B

THE STATUTE INVOLVED

Section 47 of the Criminal Code of the United States, Title 18, United States Code Annotated, Section 100:

"Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than \$5,000, or imprisoned not more than five years, or both. (Mar. 3, 1875, s 1, 18 Stat. 479; Mar. 4, 1909, c. 321, s 47, 35 Stat. 1097.)"

C

THE INDICTMENT

The indictment, omitting formal parts, is as follows:

"That heretofore, to-wit, during the period from December 5, 1942 to July 11, 1944, both dates inclusive, at New Orleans, Louisiana, in the New Orleans Division of

the Eastern District of Louisiana and within the jurisdiction of this Court, one RICHARD HENRY LEA, JR., whose full name is otherwise unknown to your Grand Jurors, hereinafter referred to as "Defendant", did unlawfully, feloniously and fraudulently embezzle and convert to his own use certain monies and property of the monies and property of the United States of America, to-wit, the sum of 18,133.64, a further description of which is unknown to your Grand Jurors, the sum of \$18,133.65 being the proceeds of sales of certain United States War Savings Bonds, Series E, made by United Theatres, Incorporated during the period aforesaid, the said United Theatres, Incorporated being then and there duly authorized and qualified to act as issuing agent for the sale of said United States War Savings Bonds, Series E, and the said defendant having then and there come into the lawful possession of said monies as an agent and employee of the said United Theatres, Incorporated; contrary to the form of the statute in such case made and provided against the peace and dignity of the United States." (R. 2-3).

D

DEMURRER TO INDICTMENT

That as this Court in *Moore v. United States*, 160 U. S. 268, held that an indictment under this statute in the general language of the statute, insufficient, petitioner demurred to the indictment as failing to set forth facts showing that the monies came lawfully into the possession of petitioner under circumstances which created a fiduciary relation between him and the United States, and that he breached such trust, (R. 4-6), which petitioner urged in

the District Court and the Circuit Court of Appeals, was the gist of the crime of embezzlement.

The District Court overruled the demurrer (R. 7). The Circuit Court of Appeals sustained such ruling, giving a reason therefor, in particular, as follows:

"We think: that the allegation that "the defendant having then and there come into the lawful possession of said monies as an agent and employee of the said United Theatres, Incorporated," should be taken in connection with the other allegations in the indictment and that, so considered, it is an allegation of fact; that the facts alleged are sufficient to show that when the Defendant, as an agent or employee, came into the lawful possession of said money, his possession was in trust; that the indictment is amply sufficient to sustain a plea of former jeopardy to any other indictment for the same offense, and that no omission therein hampered the Defendant in preparing his defense." (R. 25)

E

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 15, 1947 (R. 27). A petition for rehearing was denied March 17, 1947 (R. 30).

The jurisdiction of this Court to review the decision herein, is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, appearing in Title 28 United States Code Annotated, Section 347. See

also Rule 37(b) (2) of the Federal Rules of Criminal Procedure.

F

**REASONS FOR GRANTING PETITION
FOR WRIT OF CERTIORARI**

1. The decision below in sustaining the indictment herein, gives an interpretation to the decision of this Court in *Moore v. United States*, 160 U. S. 268, contrary to the interpretation given such decision by the Second Circuit Court of Appeals in *Weinhandler v. United States*, 20 F. (2d) 359, wherein the court, in following *Moore v. United States*, *supra*, said:

“Embezzlement is established by proof that the property came lawfully into a defendant’s possession under circumstances which create a *fiduciary relation between a defendant and its owner*, and that there was a breach of trust or a wrongful appropriation of the property to the defendant’s use. *Moore v. United States*, 160 U. S. 268, 16 S. Ct. 294, 40 L. Ed. 422.” (Emphasis ours)

That, as shown by the indictment, any trust relation that could be inferred with petitioner, was between him and his employer, United Theatres, Incorporated, and not the United States, the alleged owner of the monies.

2. The decision of the Circuit Court of Appeals herein is one of general importance under the federal statute, and does not confine the crime of embezzlement as denounced therein to a person in lawful possession of property by rea-

son of a fiduciary relation between him and the owner of such property, and a breach by such person of such trust, as has been heretofore recognized as the gist of the crime of embezzlement.

See:

Moore v. United States, 160 U. S. 268, 40 L. Ed. 422;

McCann v. United States, 2 Wyo. 274;

People v. Mooney, 135 N. E. 776;

People v. Ehle, 118 N. E. 970;

State v. Cochran, 80 S. W. (2d) 182;

Weber v. State, 208 N. W. 923, 45 A. L. R. 928;

Griffin v. State, 4 Tex. App. 390;

United States v. Bornemann, 36 F. 257;

Bishop's Criminal Law, Sixth Edition, Vol. 2, page 295;

Wharton's Criminal Procedure, Tenth Edition, Vol. 1, Sec. 586, pages 742, 743.

Weinhandler v. United States, 2nd Cir., 20 F. (2d) 359.

WHEREFORE (your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court of Appeals had in the case

number and style on its docket, "*Richard Henry Lea, Jr., appellant vs. United States of America, appellee, Number 11,736,*" to the end that this cause may be reviewed and determined by this Court as provided for by the Constitution of the United States and the judgment herein of said United States Circuit Court of Appeals be reversed by the Court, and for such other relief as to this Court may seem proper.

M. A. GRACE,
EDWIN H. GRACE,
Attorneys for Petitioner.

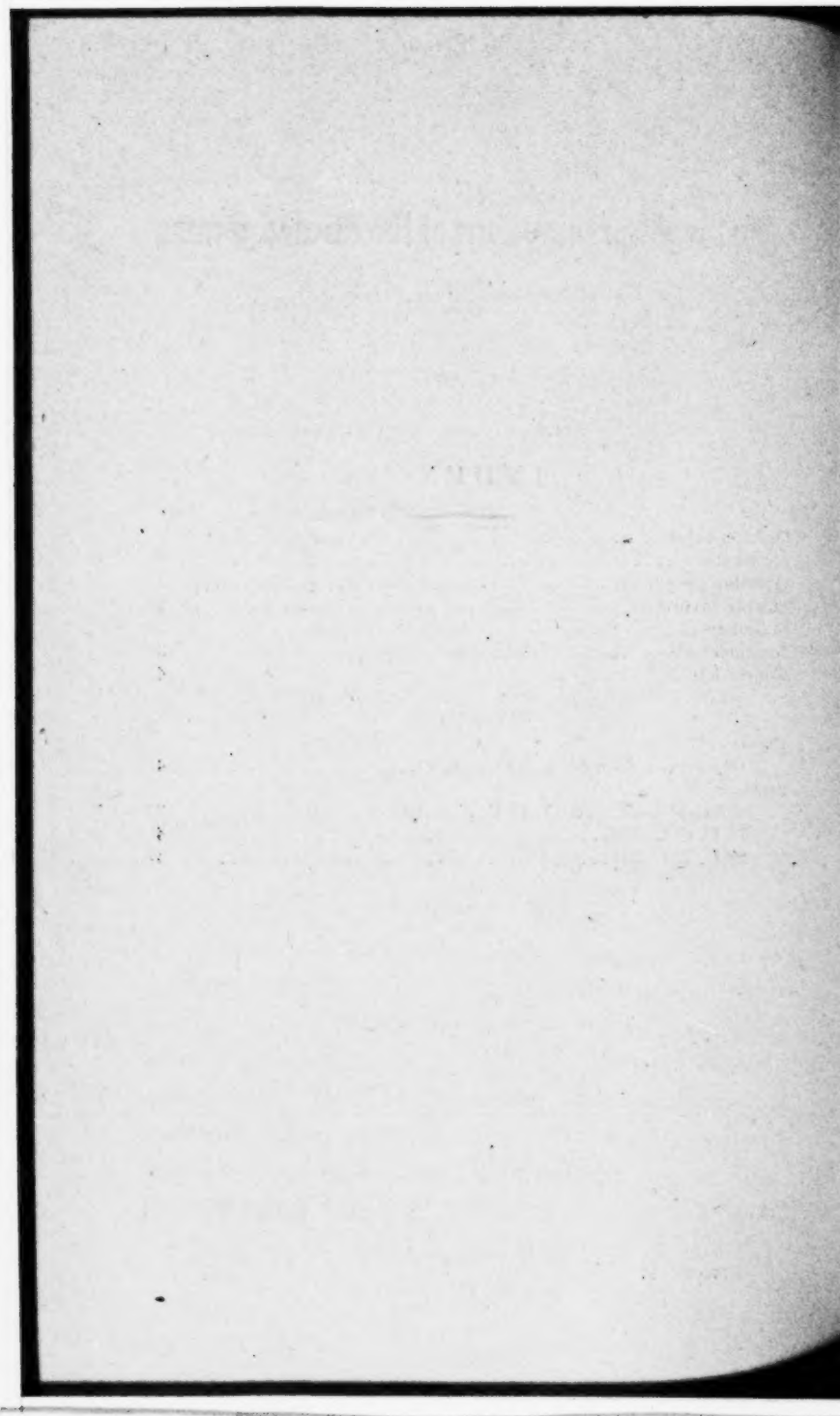
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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1247

RICHARD HENRY LEA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 22-24) is reported at 159 F. 2d 939.

JURISDICTION

The judgment of the circuit court of appeals was entered February 15, 1947 (R. 25), and a petition for rehearing (R. 26-27) was denied March 17, 1947 (R. 28). The petition for a writ of certiorari was filed April 14, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the indictment charging that petitioner embezzled moneys of the United States is fatally defective for failure to allege that a fiduciary relationship existed between petitioner and the United States.

STATUTE INVOLVED

Section 47 of the Criminal Code (18 U. S. C. 100) provides:

Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

STATEMENT

On October 12, 1944, an indictment in one count was returned in the District Court for the Eastern District of Louisiana, charging that between December 5, 1942, and July 11, 1944:

* * * Richard Henry Lea, Jr., whose full name is otherwise unknown to your Grand Jurors, hereinafter referred to as "defendant," did unlawfully, feloniously and fraudulently embezzle and convert to his own use certain monies and property of the United States of America, to-wit, the sum of \$18,133.64, a further description of which is unknown to your Grand Jurors, the said sum of \$18,133.64, being the proceeds of sales of certain United States War

Saving Bonds, Series E, made by United Theatres, Incorporated during the period aforesaid, the said United Theatres, Incorporated being then and there duly authorized and qualified to act as issuing agent for the sale of said United States War Saving Bonds, Series E, and the said defendant having then and there come into the lawful possession of said monies as an agent and employee of the said United Theatres, Incorporated; * * * (R. 2).

Petitioner demurred to the indictment (R. 4-6) on the ground, *inter alia*, that it failed to show a fiduciary relationship between him and the United States (R. 4). The demurrer was overruled (R. 7), and thereafter petitioner entered a plea of *nolo contendere* (R. 9-10). He was sentenced to imprisonment for two years (R. 10-11). On appeal, the judgment was affirmed (R. 25).

ARGUMENT

The only question here is whether the indictment is fatally defective for failure to allege the existence of a fiduciary relationship between petitioner and the United States, the owner of the monies obtained from the sale of the war bonds (see Pet. 5-6).

As the court below pointed out (R. 23-24), such a relationship is fairly averred in the series of allegations that petitioner *embezzled* monies of the United States, the proceeds of sales of war savings bonds made by United Theatres, which was a duly authorized issuing agent for the sale

of such bonds, and that petitioner came into the lawful possession of the monies as an employee and agent of United Theatres. These allegations show that as an employee of United Theatres, a corporation which could act only through its officers and agents, petitioner occupied a position of trust in relation to property of the United States which lawfully came into his possession. Thus, the indictment alleges every element of a fiduciary relationship between petitioner and the United States. At worst, there is a mere imperfection in form in the omission specifically to state by way of conclusion from the foregoing that such a relationship existed. Such a defect, which obviously did not affect the substantial rights of petitioner, does not vitiate his conviction on his plea of *nolo contendere*. See 18 U. S. C. 556; 28 U. S. C. 391; *Hagner v. United States*, 285 U. S. 427.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

✓ GEORGE T. WASHINGTON,
Acting Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

✓ ROBERT S. ERDAHL,
✓ SHELDON E. BERNSTEIN,

Attorneys.

MAY 1947.

